BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3602

JOYCE E. JENNINGS,

Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

ALEXANDRA O. LIO
CHISHOLM, CHISHOLM & KILPATRICK
One Turks Head Place, Suite 1100
Providence, RI 02903
(401) 331-6300 (telephone)
(401) 421-3185 (facsimile)
Attorney for Appellant

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STATEMENT OF THE ISSUE

The Board of Veterans' Appeals denied Ms. Jennings' claim for entitlement to DIC benefits and service connection for the cause of her husband's death and based on a lack of nexus evidence. No medical opinion was sought in this case based on the Board's conclusion that there was a lack of competent evidence linking the claimed condition to military service. Did the Board misinterpret 38 U.S.C. § 5103A when it found that, "[w]ithout any competent evidence linking the Veteran's esophageal cancer to his military service, VA has no duty to seek a medical opinion"?

STATEMENT OF THE CASE

Mr. Michael Jennings served on active duty in from May 1969 to April 1971, including service in the Republic of Vietnam. R-74. In April 2012, he submitted a claim for service connection for a number of disabilities, including adenocarcinoma of the esophagus metastatic to the bones. R-169-76. Unfortunately, Mr. Jennings died on May 17, 2012. R-72. His death was caused by metastatic esophageal cancer. *Id.*

In June 2012, the Veteran's spouse, Mrs. Joyce Jennings, submitted a claim for entitlement to "death benefits." R-403. The RO denied Mrs. Jennings' claim based on service connection for cause of death in September 2012. R-396-402. She filed a notice of disagreement with this decision the same month. R-371. The RO issued a statement of the case, and Mrs. Jennings subsequently perfected her appeal to the Board. *See* R-36-67; R-34-35.

Mrs. Jennings testified at a hearing before the Board in December 2014. R-303-12. She testified that her husband had been exposed to herbicides in service and she believed this was the cause of his esophageal cancer. R-305-06. In support of her claim, she explained that her husband had no other risk factors for esophageal cancer. R-307. She expressed frustration with the lack of assistance she was able to get from VA doctors, stating that they would only look at the "list" and declined to provide her an opinion. R-308. The hearing officer explained that obtaining a favorable opinion could be difficult, but advised, "If you do find a doctor, I mean, the things you could talk about to him are the level, the things you've testified about." R-308. The hearing officer cited the NAS reports and explained that while the report was not an exhaustive list, "when it's not on that list, then it does create more of an obstacle to establishing service connection." R-309. However, acknowledging his lack of medical expertise, the hearing officer stated he would be happy to consider any additional evidence from a "doctor explaining sort of why, if you can find a doctor who does study the evidence and believes that it is as likely as not that esophageal cancer was the result of herbicides exposure that your husband was presumed to have had, and why it is important in this case." R-309-10.

The Board issued its decision June 30, 2015, denying Mrs. Jennings' claim for service connection for esophageal cancer for accrued benefits and substitution purposes as well as service connection for the cause of the Veteran's death. R-2-15. This appeal followed.

SUMMARY OF THE ARGUMENT

The Board denied Mrs. Jennings' claims for entitlement to DIC benefits and service connection for her husband's cause of death. Its decision rests on its misinterpretation of the 38 U.S.C. § 5103A. The Board required medical evidence linking the Veteran's cancer to service in order to trigger VA's duty to assist. However, no such requirement is found under 38 U.S.C. § 5103A. Its decision should be vacated and the appeal remanded for the Board to obtain a medical opinion to aid Mrs. Jennings in the development of the claims. The Board also erred by failing to properly advise Mrs. Jennings on evidence which may have been advantageous to her claim, thus, she was not afforded an adequate hearing and remand is appropriate. Alternatively, the decision should be vacated and the remanded for the Board to provide adequate reasons or bases as to whether a medical opinion is warranted in light of the correct interpretation of the law.

STANDARD OF REVIEW

The Court reviews the Board's decisions regarding claims for increased ratings or for service connection under the clearly erroneous standard. A determination regarding service connection or the degree of impairment for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). The Board's answer to that question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999). However, the Court reviews claimed legal errors by the Board under

the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a); *see Butts v. Brown*, 5 Vet. App. 532 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. The Court should determine whether the Board's interpretation of 38 U.S.C. § 5103A, which requires proof of nexus prior providing a medical opinion is, is not in accordance with law.

ARGUMENT

The Board's denial of Ms. Jennings' claim rests on a misinterpretation of the law governing its duty to assist her in the development of her claim.

Mrs. Jennings seeks entitlement to service connection for esophageal cancer and DIC benefits. Her claim is premised on the belief that her husband's death from esophageal cancer was due to his exposure to Agent Orange while he was in Viet Nam. *See* R-8. There is no dispute that her husband, Michael R. Jennings, served in the Republic of Vietnam and is presumed to have been exposed to herbicides as part of his military service. *See* R-74 (DD 214); R-11 (Board acknowledgement of the Veteran's service during the Vietnam War); *see also* 38 C.F.R. § 3.307(a)(1) (2015). A medical opinion is necessary to adjudicate the remaining issue, whether Mr. Jennings' esophageal cancer was related to his military service. The Board misinterpreted the law when it found that it was not obligated to obtain a medical opinion in this case.

VA is obligated to provide assistance to claimants in the development of their claims before the agency. 38 U.S.C.§ 5103A. This duty requires the Secretary to make reasonable efforts to assist a claimant in obtaining evidence "necessary to substantiate the claimants claim for benefits under a law administered by the Secretary." 38 U.S.C. § 5103A(a)(1). Such assistance is only not required where "no reasonable possibility exists" that such assistance would aid in substantiating the claim. 38 U.S.C. § 5103A(2). This obligation includes seeking a medical opinion on DIC claims when one is necessary to decide the claim unless there is no reasonable possibility that such an opinion could aid in substantiating the claim; or, for claims relating to disability compensation it includes seeking an opinion where the evidence indicates a relationship between the claimed disorder and military service.

The Board concluded that "[w]ithout any competent evidence linking the Veteran's esophageal cancer to his military service, VA has no duty to seek a medical opinion." R-7-8. This is inconsistent with, and misinterprets, 38 U.S.C. § 5103A(d) and (a) and 38 C.F.R. § 3.159(c)(4) (2015), as no provision requires a claimant to obtain a nexus opinion before VA must seek a medical opinion.

a. The Board's interpretation of the scope of the duty to assist prejudiced Ms. Jennings regarding entitlement to assistance related to her claim for DIC benefits.

Mrs. Jennings' claims on appeal include a claim for DIC benefits. The Federal Circuit has acknowledged that because DIC claims are not "disability compensation" claims 38 U.S.C. § 5103A(a) is applicable, but the provisions of § 5103A(d) are not.

Wood v. Peake, 520 F.3d 1345, 1349-50 (Fed. Cir. 2008). In *Wood,* the Circuit held that 38 U.S.C. §5103A(a) "requires the VA to provide a claimant with a free medical opinion whenever such an opinion is (1) 'necessary to substantiate [the] claim,' unless (2) 'no reasonable possibility exists that such assistance would aid in substantiating [the] claim.'" *Id.* This is a less stringent standard that found under 38 U.S.C. § 5103A(d). *See DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008).

Under 5103A(a), the duty to assist is applicable unless there is *no* reasonable possibility that such assistance could aid in substantiating the claim. The Board here effectively acknowledged that a medical opinion could possibly benefit Ms. Jennings' claim. At the Board hearing, the Board judge explained, "The problem is, you know, without this medical, I mean, the case turns roughly on the medical evidence and it has to you, you know, the issues are that, the disabilities and illness that are presumptively service connected are based on epidemiological testing of individuals." R-308-09. The Board concluded, "But I think that you, you'll be happy to know sort of what you need to find and what evidence to show and, you know, none of us are doctors here, so we, you know, don't understand the science behind what it is." R-309. The Board specifically acknowledged that the claims hinged on a medical assessment and that it is possible to establish service connection for those conditions not currently presumed to be related to herbicide exposure. R-308-09. If the Board believed that there was no reasonable possibility that a medical opinion would help substantiate the claim, it would not have implied that Mrs. Jennings seek one. 38

C.F.R. § 3.103(c)(2) (hearing officer should "suggest the submission of evidence that . . . would be of advantage to the claimant's position.").

The Board added an additional requirement to the provisions of 38 U.S.C. § 5103A(a) that requires the claimant to submit nexus evidence prior to obtaining a medical opinion. This requirement imposes a greater burden than provided by law, which provides that a medical opinion should be afforded so long as there is a reasonable possibility that one could aid in substantiating the claim. *See Pernorio v. Derwinksi*, 2 Vet.App. 625, 628 (1992) (holding the Board erred when it applies a standard that exceeded that found in the regulation). Had the Board properly interpreted the law, it would have sought a medical opinion as it acknowledged that a medical opinion was necessary to ascertain whether Mr. Jennings' esophageal cancer was due to his herbicide exposure. *See* R-309. Alternatively, even if the Board's findings and statements made during the hearing do establish that a reasonable possibility exists that an opinion could aid in substantiating the claim had the Board properly interpreted the law it may have found that a medical opinion was necessary to adjudicate the claim.

The Board's failure to properly interpret the law was prejudicial as a medical opinion could provide sufficient information to establish entitlement to the benefits sought. Mrs. Jennings testified that her husband had no known risk factors for developing esophageal cancer. R-307. In order to determine the etiology of his cancer a medical opinion is needed. The Board erred because whether there is a

reasonable possibility that the condition was due to herbicide exposure is a medical determination. However, while esophageal cancer is not a condition which has been acknowledged to be presumptively related to herbicide exposure, VA has awarded benefits for this disability when a medical opinion is added to the record. *See e.g.* No. 04-17060, 2004 WL 3290816, *1, *7 (BVA May 28, 2004) (Board decision awarding service connection for adenocarcinoma of the esophagus secondary on exposure to herbicides in service based on favorable medical opinions); No. 07-08292, 2010 WL 2480579, *1, *8 (BVA April 29, 2010) (Board decision awarding service connection for esophageal cancer due to exposure to Agent Orange for accrued purposes and establishing service connection for cause of death based on favorable medical opinions). These decisions demonstrate that a medical opinion may substantiate a claim Mrs. Jennings' claim, and that Mrs. Jennings was prejudiced by the Board's failure to seek one. The Board's decision should be vacated and the appeal remanded as it rests on a misinterpretation regarding the Board's duty to assist Mrs. Jennings in the development of her claim. This was prejudicial as there is a reasonable possibility that an opinion could support her claim.

b. There Board's decision reflects a more stringent standard than is established under 38 U.S.C. § 5103A(d) and 38 C.F.R. § 3.159(c)(4).

The provisions of 38 U.S.C. § 5103A(d) and 38 C.F.R. § 3.159(c)(4) are applicable to the issue of entitlement to disability compensation benefits. Mrs. Jennings' claim also encompasses entitlement to service connection for esophageal

cancer for accrued benefits and substitution purposes. R-3. This issue is also intertwined with her claim for entitlement to DIC benefits as a remand for a medical opinion to support that claim would directly affect these claims. *See Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (stating that for judicial economy when "two claims are sufficiently intertwined . . . they should be considered together.").

The Board also improperly interpreted the law when it failed to adjudicate the issue of duty to assist consistent under 38 U.S.C. § 5103A(d). In addressing the duty to assist as it relates to compensation claims, the Board's decision again applies a more stringent standard than that set forth under the statute as well. The Secretary will obtain a medical opinion in compensation cases when there is competent evidence of a current disability; the claimant experienced an event, injury, or disease in service; evidence indicates that the disability or symptoms may be associated with the claimant's military service; and the record contains insufficient to make a decision on the claim. 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4) (2015). Neither the plain language of the statute or the regulation reference medical evidence of nexus.

To the contrary, the Court's decision in *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006), explained that whether evidence indicates there may be a nexus between the claimed condition and service is low threshold. In fact, the Court acknowledged that "although the medical evidence was deemed insufficient *establish* a nexus, that evidence, together with other evidence of record, may nevertheless be sufficient to conclude that it 'indicates' that the [ ] current disability 'may be associates' with an in-

service injury." *Id.* at 84. Thus, the Court has directly addressed this issue and found that medical evidence of nexus is not required prior to finding that the duty to assist is triggered. *See also See Shade v. Shinseki*, 24 Vet.App. at 110, 120 (2010).

Here, the Board found evidence of a disability. *See* R-9 (Board's finding that the Veteran as diagnosed with esophageal cancer). Mr. Jennings' exposure to herbicides in service is conceded, and thus, an in-service event has been established. *See* R-74; R-7 (Board's concession that the Veteran was "presumed to have had herbicides exposure while service in Vietnam."). Further, there is evidence that indicates that his in-service exposure is related to his later development of esophageal cancer.

Specifically, Ms. Jennings testified that her husband was not known to have any risk factors for developing this type of cancer. *See* R-306-307 (explaining that esophageal carcinoma is often associated with reflux or obesity neither of which affected the Veteran). She explained that her husband did not suffer from reflux and was not obese, which she has been advised were common causes of this type of cancer. R-307. There is no clinical or treatise evidence which rules out the possibility that herbicide exposure could be the cause of Mr. Jennings cancer.
Her statement is an indication that there may be a relationship between the Veteran's cancer and his exposure to herbicides and there is a reasonable possibility that a medical opinion could aid in substantiating the claim because it rules out the

common causes of esophageal cancer. The Board did not consider whether sufficient evidence existed because it used the wrong standard.

The Board's determination that it had not duty to assist Mrs. Jennings in the development of her claim is contrary to the law. Its decision should be vacated and her appeal remanded as there is no requirement she submit "competent medical evidence linking" the Veteran's esophageal cancer with his herbicide exposure prior to being entitled to VA's assistance. Rather, if such evidence existed then service connection would be warranted and a medical opinion would not be necessary. The Board's decision should be remanded for VA to obtain a medical opinion in this case.

Because the Board erred in failing to obtain a necessary medical opinion under 38 U.S.C. § 5103A(d) it also failed to comply with its statutory duty to assist under § 5103A(a). A remand for the Board to comply with the duty to assist in adjudicating Mrs. Jennings' claim for service connection for her husband's cause of death will also affect her claim for entitlement to DIC benefits, thus this claim is intertwined and should be remanded as well.

c. The Board's failure to properly interpret 38 U.S.C. § 5103A(a) and (d) further prejudiced Mrs. Jennings as the Board judge failed to properly advise her of what evidence would aid in her claim.

Mrs. Jennings was advised by the Board judge that her case "turns roughly on the medical evidence" and to submit a nexus opinion in support of her claim. R-309. The Board judge advised, "If you can find a doctor who does study the evidence and believes that it is as likely as not that the esophageal cancer was the result of this

herbicide exposure that your husband was presumed to have had, the why is important in this case." R-309. He advised that she should obtain a nexus opinion with supporting rationale. R-310. The Board judge, however, erred by failing to advise Mrs. Jennings that she could submit other evidence to help support her claim and which may be of assistance to VA in developing the claim further.

38 C.F.R. § 3.103(c)(2) (2015) sets forth the purpose of hearings and sets out the duties of hearing officers. It provides: "It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggested the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." *Id.* The Court, in addressing the scope of this obligation has found that the Board errs when review of the claimant's testimony "clearly reflects that he is unaware of the type of evidence" necessary to support his claim and the Board does not provide the claimant with this information. *See Procopio v. Shinseki*, 26 Vet.App. 76, 82 (2012).

As discussed above, evidence of nexus is not required to trigger the duty to assist. However, the Board's misinterpretation of the law prejudiced Mrs. Jennings because the Board judge did not explain that *any* evidence supportive of the issue of nexus would be helpful in adjudicating in her claim. Here, evidence *suggestive* of nexus would have been advantageous to Mrs. Jennings' position because it could have led to VA providing her with a medical opinion to support her claim. However, the Board judge failed to advise Mrs. Jennings of this fact.

A review of the hearing transcript makes clear Mrs. Jennings was under the impression that the only evidence that was missing or that could support her claim was a medical nexus opinion from a treating physician. *See* R-308-10. This is not correct. A treating physician is not required. Nor is any medical professional: Mrs. Jennings could have submitted treatise evidence, or medical evidence associated with another veteran's case. *See Romeo v. Brown*, 5 Vet.App. 388, 394 (1993) (finding that medical treatise evidence submitted by an appellant may establish that a claim is plausible or possible). The Board member mentioned none of this, leaving Mrs. Jennings to believe she had to obtain a medical opinion from a treating doctor. The Board thus failed to ensure compliance with 38 C.F.R. § 3.103(c)(2) and the duties imposed on hearing officers during hearing. Thus remand is warranted to correct this error.

The Board's misinterpretation of the requirements regarding the duty to assist was prejudicial. As discussed, the Board failed to provide the claimant assistance in the development of her claim, though there was a reasonable possibility that a medical opinion could aid in substantiating her claims. Accordingly, the Board's decision should be vacated and the appeal remanded so that the Board may obtain a medical opinion addressing whether Mr. Jennings' esophageal cancer, from which he died, was due to his military service. Alternatively, the decision should be vacated and remanded for the Board to provide adequate reasons or based regarding whether a

medical opinion is needed in context of the correct legal standards. *See* 38 U.S.C. § 7104.

CONCLUSION

The Board misinterpreted 38 U.S.C. § 5103A(a) and (d) in its decision which denied Ms. Jennings's claim for service connection for cause of death and DIC benefits. The Board read into the statute a requirement of competent evidence to indicate nexus which is not found in the provision of the statute which is applicable to Ms. Jennings's claim. Accordingly, the Board's decision should be vacated and the appeal remanded for the Board to seek a medical opinion to aid in substantiating the claim. Alternatively, the Board should provide adequate reasons or bases for its determining regarding whether a medical opinion is warranted under the correct legal standard.

Respectfully submitted,

Joyce Jennings
By Her Attorneys,
/s/ Alexandra Lio
Alexandra Lio
Chisholm Chisholm & Kilpatrick
One Turks Head Place, Ste 1100
Providence, Rhode Island 02903
(401) 331-6300